

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 11 of the	)	CS Docket No. 98-82
Cable Television Consumer Protection and)	
Competition Act of 1992)	
)	
Implementation of Cable Act Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications Act)	
of 1996)	
)	
The Commission's Cable Horizontal and	)	MM Docket No. 92-264
Vertical Ownership Limits and Attribution)	
Rules)	
)	
Review of the Commission's Regulations	)	MM Docket No. 94-150
Governing Attribution of Broadcast and)	
Cable/MDS Interests)	
)	
Review of the Commission's Regulations	)	MM Docket No. 92-51
and Policies Affecting Investment in the)	
Broadcast Industry)	
)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy)	

To: The Commission

**COMMENTS OF VIACOM INC.
ON RETENTION OF THE SINGLE MAJORITY SHAREHOLDER
EXEMPTION TO THE BROADCAST ATTRIBUTION RULES**

Anne Lucey
Vice President, Regulatory Affairs
Viacom Inc.
1501 M Street, NW
Suite 1100
Washington, DC 20005

Steven A. Lerman
Meredith S. Senter, Jr.
John D. Poutasse

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, NW
Suite 600
Washington, DC 20006-1809

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	(i)
I. BACKGROUND	2
II. THE EXEMPTION IS CONSISTENT WITH THE PURPOSE OF THE ATTRIBUTION RULES.	3
A. The Purpose Of The Attribution Rules Is To Identify Ownership Interests, Positional Interests And Other Relationships That Confer On Their Holders A Degree Of Influence Such That The Holders Have A Realistic Potential To Affect The Programming Decisions Or Other Core Operating Functions Of Licensees.	3
B. The Commission Originally Adopted The Single Majority Shareholder Exemption Based On The Determination That Minority Shareholders Do Not Have The Ability To Affect Programming Decisions Or Other Core Operating Functions Of The Licensee.	5
C. The Proponents Of Any Change To The Existing Single Majority Shareholder Exemption Have The Burden Of Justifying Its Repeal.	6
D. Nothing Has Changed That Would Justify Repeal Of The Exemption: A Minority Shareholder In A Corporation With A Single Majority Shareholder Still Lacks The Power To Affect Measurably The Outcome Of Elective Or Discretionary Corporate Decisions.	8
E. There Is No Evidence That The Single Majority Shareholder Exemption Has Been Abused, And In Any Event, The Recently Adopted EDP Rule Guards Against Abuses.	10
III. THE SPECIFIC QUESTIONS RAISED IN THE FNPRM DO NOT PROVIDE ANY NEW BASIS FOR THE REPEAL OF THE SINGLE MAJORITY SHAREHOLDER EXEMPTION.	11
A. The Fiduciary Duties Owed To Minority Shareholders Under General Principles Of Corporate Law Do Not Give Minority Shareholders The Ability To Affect Programming Decisions Or Other Core Operating Functions Of Broadcast Licensees.	12
B. A Minority Shareholder Cannot Exert Meaningful Influence Over A Corporate Licensee's Core Operational Decisions By Virtue Of Its Ability To Divest Its Equity Interest In The Corporation.	14

C.	A Minority Shareholder Does Not Have An Automatic Right To Confidential Business Information And, If Such Information Is Obtained, Must Keep It In Confidence.	15
D.	The Influence of Minority Shareholders In A Corporation Controlled By A Single Majority Shareholder Is Substantially Less Than The Influence Exercised By Other Corporate Constituents.	17
IV.	CONCLUSION.....	20

SUMMARY

The single majority shareholder exemption should be retained because the exemption is consistent with the purpose of the broadcast ownership attribution rules. A minority shareholder in a corporation with a single majority shareholder does not have the ability, solely as a result of the minority shareholder's ownership interest, "to affect the programming decisions of licensees or other core operating functions" or "to measurably affect the outcome of elective or discretionary corporate decisions." Because a single majority shareholder controls the election of all members of the board of directors, minority shareholders have no influence over the board of directors or management of a corporation by virtue of their ownership interests in the corporation.

There is also no evidence that the single majority shareholder exemption, standing alone, has been abused. In 1999, the Commission expressed concern that a large minority stock ownership interest, when combined with other interests in or relationships with the licensee, might give the holder sufficient potential influence over the licensee to warrant attribution. To address this concern, the Commission adopted the equity/debt plus ("EDP") rule. The EDP rule continues to guard against potential abuses. Therefore, no change to the single majority shareholder exemption is necessary.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 11 of the	)	CS Docket No. 98-82
Cable Television Consumer Protection and)	
Competition Act of 1992)	
)	
Implementation of Cable Act Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications Act)	
of 1996)	
)	
The Commission's Cable Horizontal and	)	MM Docket No. 92-264
Vertical Ownership Limits and Attribution)	
Rules)	
)	
Review of the Commission's Regulations	)	MM Docket No. 94-150
Governing Attribution of Broadcast and)	
Cable/MDS Interests)	
)	
Review of the Commission's Regulations	)	MM Docket No. 92-51
and Policies Affecting Investment in the)	
Broadcast Industry)	
)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy)	

To: The Commission

**COMMENTS OF VIACOM INC.
ON RETENTION OF THE SINGLE MAJORITY SHAREHOLDER
EXEMPTION TO THE BROADCAST ATTRIBUTION RULES**

Viacom Inc. ("Viacom"), by its attorneys, hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking ("*FNPRM*") in the above-captioned proceeding (FCC 01-263, released September 21, 2001). Viacom's comments are directed towards the narrow question of whether the Commission should reinstate the single majority shareholder exemption to the broadcast ownership attribution rules. As explained

below, Viacom submits that the single majority voting shareholder exemption should be reinstated.

I. BACKGROUND

In January 2001, the Commission reconsidered its August 1999 decision not to eliminate the single majority shareholder exemption and repealed the exemption for purposes of the broadcast attribution rules. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1116-17 (2001) (“*2001 Reconsideration Order*”). The Commission justified its decision to repeal the exemption on the basis of its earlier decision to eliminate the single majority shareholder exemption for purposes of the cable ownership attribution rules. *Id.* at 1116.

In *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (“*Time Warner II*”), the Court of Appeals reversed and remanded the Commission’s decision to eliminate the single majority shareholder exemption for purposes of the cable television horizontal ownership and vertically integrated programming rules. In light of the *Time Warner II* decision, several parties, including Viacom, petitioned the Commission to reconsider its decision to eliminate the single majority shareholder exemption. The petitions for reconsideration filed by Viacom and others are incorporated by reference in this proceeding. FNPRM at ¶ 91.¹

In the FNPRM, the Commission solicits comments on whether it should repeal or reinstate the single majority shareholder exemption. FNPRM at ¶ 88. In particular, the

¹ On December 14, 2001, the Commission suspended the elimination of the single majority shareholder exemption for purposes of the broadcast and cable/MDS attribution rules pending the resolution of this proceeding. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, FCC 01-353 (released December 14, 2001).

Commission asks whether “there is a sound basis on which to conclude that a minority shareholder’s influence over a corporation that has a single majority shareholder is so limited that the minority shareholder’s interest should not be attributable under such circumstances.” FNPRM at ¶ 90. In addition, the Commission asks for comments on whether a minority shareholder might be able to exert influence over a broadcast licensee’s core operational functions by the following means: (i) as a result of the fiduciary duties owed to minority shareholders under general corporate law; (ii) by virtue of the minority shareholder’s ability to withdraw a substantial capital investment in the corporation; (iii) through the minority shareholder’s access to confidential corporate information; and (iv) as a consequence of management’s responsibility to pay attention to the interests of significant, but not controlling, shareholders. *Id.* at ¶ 90. Finally, the Commission asks whether there are differences between the broadcasting or MDS industries and cable systems that would justify different treatment under the attribution rules. *Id.* at ¶ 92.

II. THE EXEMPTION IS CONSISTENT WITH THE PURPOSE OF THE ATTRIBUTION RULES.

A. The Purpose Of The Attribution Rules Is To Identify Ownership Interests, Positional Interests And Other Relationships That Confer On Their Holders A Degree of Influence Such That The Holders Have A Realistic Potential To Affect The Programming Decisions Or Other Core Operating Functions Of Licensees.

The attribution rules identify ownership or positional interests and relationships with broadcast licensees that are cognizable – i.e., “count” – for purposes of the FCC’s multiple ownership rules. *See* 47 C.F.R. § 73.3555 Note 2. *See also Reexamination of Commission’s Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 97 F.C.C. 2d 997, 999 (1984) (“1984 Attribution Order”).

For good reason, not all ownership interests are attributable.

The Commission recognized at the outset of this broadcast attribution rulemaking proceeding that the attribution rules should not unnecessarily inhibit the free flow of capital to the broadcast industry:

While our focus is on the issue of influence or control, at the same time, we must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry.

Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rulemaking, 10 FCC Rcd 3606, 3610 (1995) ("*Attribution of Broadcast Interests NPRM*"). When a person holds an attributable interest in a broadcast licensee, the multiple ownership rules limit both that person's ability and the licensee's ability to acquire attributable interests in other broadcast licensees, in daily newspapers and in cable television systems. *See* 47 C.F.R. §§ 73.3555 (broadcast and broadcast/newspaper ownership rules) and 76.501 (cable/broadcast ownership rule). Particularly in the case of publicly held corporations, like Viacom,² that do not choose their shareholders, it is important that the Commission carefully tailor the attribution rules to achieve the purposes of the ownership rules, without unduly discouraging the free flow of capital.³

With these considerations in mind, the Commission, rather than attributing all ownership interests, has decided to "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a *realistic* potential to affect the programming decisions of licensees or other core operating

² Viacom is controlled by a single majority voting shareholder, NAIRI, Inc.

³ If the Commission were to eliminate the single majority shareholder exemption and replace it with *ad hoc* evaluations of minority shareholder interests in single majority shareholder corporations, investors would be uncertain whether their interests would be deemed attributable, and the free flow of capital to corporations controlled by a single majority shareholder might be impeded. Additionally, if a person holding other media interests were to acquire a 5% or greater voting interest in Viacom by acquiring publicly traded stock, Viacom itself might be precluded from making acquisitions.

functions.” *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12560 (1999) (“1999 Broadcast Attribution Order”) (emphasis added). *See also BBC Licensee Subsidiary, L.P.*, 10 FCC Rcd 7926 (1995). The Commission has concluded that the core operating functions of a broadcast licensee include decisions relating to programming, personnel and finances. *Attribution of Broadcast Interests NPRM*, 10 FCC Rcd at 3609.

B. The Commission Originally Adopted The Single Majority Shareholder Exemption Based On The Determination That Minority Shareholders Do Not Have The Ability To Affect Programming Decisions Or Other Core Operating Functions Of The Licensee.

The single majority shareholder exemption is one exception to the general rule on the attribution of voting stock interests. As a general rule, the Commission treats 5 percent or greater voting stock interests as attributable. The Commission has determined that while “[s]hareholders with voting stock interests amounting to 5 percent or more may not have actual control over the management and operations of a licensee, . . . those shareholders have a realistic potential to exert significant influence or control over the licensees in which they invest.” The Commission found that “a shareholder with voting stock interests that exceed the benchmark can influence the selection of board members through mechanisms such as proxy fights and, therefore, exert influence on the management of a licensee’s operations.” *2001 Reconsideration Order*, 16 FCC Rcd at 1104.

The single majority shareholder exemption exempts all minority voting stock interests, regardless of their size, in a corporation in which one stockholder holds more than 50 percent of the outstanding voting stock, unless the minority interest is otherwise attributable under the equity/debt plus (“EDP”) rule. *See* 47 C.F.R. § 73.3555 Notes 2(b) and 2(f). In originally adopting the single majority shareholder exemption, the Commission reasoned that

minority shareholders, “even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings.” *1984 Attribution Order*, 97 F.C.C.2d at 1008-1009. The Commission affirmed the rationale for the single majority shareholder exemption in its initial Report and Order in this proceeding. *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579. Yet, without a shred of justification, other than to harmonize the cable and broadcast attribution rules, the Commission on reconsideration abruptly repealed the exemption. *2001 Reconsideration Order*, 16 FCC Rcd at 1116-17.

C. The Proponents Of Any Change To The Existing Single Majority Shareholder Exemption Have The Burden Of Justifying Its Repeal.

As the U.S. Court of Appeals declared in *Time Warner II*, the “[r]emoval of the [single majority shareholder] exemption is a tightening of the regulatory screws, if perhaps a minor one. It requires some affirmative justification.” *Time Warner II*, 240 F.3d at 1143. In other words, the proponents of any change are required to provide support for their conclusion that the exemption should be repealed, and this support must be based on “some finding grounded in experience or reason.” *Id.*

The Commission’s rationale in the *2001 Reconsideration Order* for eliminating the single majority shareholder exemption for broadcast attribution purposes did not meet this standard. The Commission offered two explanations for repeal of the exemption. First, the Commission cited its decision to eliminate the *single* majority shareholder exemption for purposes of the cable ownership attribution rules. *2001 Reconsideration Order*, 16 FCC Rcd at 1116. Second, the Commission offered the unsubstantiated conclusion that minority shareholders in a corporation with a single majority shareholder “have the potential to influence a licensee’s actions.” *Id.* In the cable attribution proceeding, the Commission stated:

None of the parties in this proceeding provided evidence that they are using this exemption or presented credible arguments that it should be retained. Given our concern that a minority shareholder may be able to exert influence over a company even where a single majority shareholder exists, and given the lack of a record in this proceeding that the exemption should be retained, on balance we believe that it is appropriate to eliminate the exemption from the general cable attribution rules.

Review of Cable Attribution Rules, 14 FCC Rcd 19014, 19046 (1999) (“*1999 Cable Attribution Order*) (emphasis added).

The Commission appears to have reversed the burden of demonstrating that repeal is justified. The Commission stated that “[a]lthough the influence of a minority shareholder may be diminished somewhat where a single majority shareholder controls the licensee, *we have no reason to believe* that the minority shareholder’s influence is eliminated or so attenuated in such circumstances that we should ignore its ownership interest for purposes of our ownership rules.” *Id.* (emphasis added). In other words, the Commission in both cases *put* the burden on proponents for no change, rather than on the proponents for change. Moreover, in neither decision did the Commission make any reference to its previous conclusion that the EDP rule adequately addressed its concerns about the single majority exemption.

To reiterate, the burden is on proponents of a change in the attribution rules to provide support for their conclusion that the exemption should be repealed, and this support, under *Time Warner II*, must be based on “some finding *grounded* in experience or reason.” This mandate is particularly relevant in light of the Commission’s original, unambiguous rationale for the single majority shareholder exemption – that minority shareholders, “even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings,” *1984 Attribution Order*, 97 F.C.C. 2d at 1008-1009 – and its subsequent determination that the EDP rule adequately addressed any concerns that some minority shareholders eligible for the exemption might nonetheless exert significant influence over a

licensee's core functions. *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579. The proponents for change have not met their burden.

D. Nothing Has Changed That Would Justify Repeal Of The Exemption: A Minority Shareholder In A Corporation With A Single Majority Shareholder Still Lacks The Power To Affect Measurably The Outcome Of Elective Or Discretionary Corporate Decisions.

Viacom submits that the single majority shareholder exemption to the broadcast attribution rules must be retained because there is no evidence that a minority shareholder has the realistic ability to exert more influence over a *broadcast* licensee's core areas of operation than such a shareholder had when the Commission originally adopted the exemption. There is no support – grounded in experience or reason – for the proposed change in the attribution rules.

There have been no changes in corporate law since the Commission originally decided to create the single majority shareholder *exemption* that would warrant its elimination. Because a single majority shareholder controls the election of all members of the board of directors, minority shareholders have no influence over the board of directors or management of a corporation by virtue of their ownership interests in the corporation.

The Commission's original rationale for the single majority shareholder exemption – that minority shareholders, “even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings” – is sound as matter of corporate law. Under corporate law, the day-to-day operations of a corporation are controlled by its board of directors. *See, e.g.,* Del. Code Ann. tit. 8, § 141(a) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of the board of directors . . .”). All decisions of a corporate broadcast licensee, including decisions relating to programming, personnel or finances, are firmly vested in the board of directors. A

single majority voting shareholder, holding more than 50% of the corporation's voting shares, has the ability to elect the board of directors, or in situations where cumulative voting rights exist, at least a majority of the board. *See Southern Pac. Co. v. Bogart*, 250 U.S. 483, 487-88 (1919) (noting that the right of those holding a majority of the capital stock of a corporation to control the corporation through the election of the board of directors is well established). Therefore, a single majority voting shareholder ultimately exercises control over the corporation.⁴ If the board of directors takes actions that are contrary to wishes of the majority shareholder, the majority shareholder can elect a new board of directors. Similarly, large minority shareholders in a company without a majority shareholder may exercise control by collaborating with other minority shareholders. Indeed in a widely held public corporation, as little as 25 or 30 percent of the voting shareholders can control the ballot box, because most individual shareholders do not vote, and a board may be elected by the majority of the votes cast.

In contrast, minority shareholders in a corporation controlled by a single majority voting shareholder, even if they vote as block, cannot cause the election of a single director in the absence of cumulative voting. As a matter of corporate law, therefore, a minority shareholder in a corporation with a single majority voting shareholder does not have the ability to affect the core operating functions of a broadcast licensee.⁵

⁴ The single majority shareholder exemption is premised on the assumption that the majority shareholder controls the corporation. *1984 Attribution Order*, 97 F.C.C. 2d at 1009 n.21 ("The exception plainly rests on the assumption that a simple majority vote is sufficient to affirmatively direct the affairs of a corporate licensee.").

⁵ To be sure, minority shareholders do have some protections, which are discussed in Section III.A. below. For example, while a majority shareholder has the power to replace a board of directors, minority shareholders may have a claim against the board of directors if it acts to favor the interests of the majority shareholder to the detriment of the minority and the corporation. All minority shareholders, however, have this right, including non-voting shareholders and less than 5 percent voting shareholders. Yet the Commission does not attribute these interests, because the right to sue the board for breach of a fiduciary duty is a far cry from having the ability to affect the core operating functions – programming, finance and personnel – of a licensee.

There is therefore a sound basis on which (1) to distinguish between 5 percent or greater voting shareholders in a corporation without a majority shareholder and minority shareholders in a corporation with a majority shareholder, and (2) to conclude that a minority shareholder's influence over a corporation that has a single majority shareholder is so limited that the minority shareholder's interest should not be attributable under such circumstances.

E. There Is No Evidence That The Single Majority Shareholder Exemption Has Been Abused, And In Any Event, The Recently Adopted EDP Rule Guards Against Abuses.

There is no evidence that the single majority shareholder exemption has been abused. Indeed, in 1996, when the Mass Media Bureau's Policy and Rules Division conducted a study of the 1994 and 1995 FCC Annual Ownership Reports, the Commission's staff concluded that there was no evidence of abuse of the single majority shareholder exemption. *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19895 at Appendix B (1996).

Again, in 1999, the Commission examined the influence of minority shareholders in single majority shareholder corporations in the Report and Order in the broadcast attribution proceeding. The Commission concluded that the newly adopted EDP rule would act as a safety valve to capture those otherwise nonattributable interests that give minority stockholders the incentive and means to exert influence or control over licensee decisions regarding core operations of broadcast stations. *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579.

The limits imposed on the availability of the single majority shareholder exemption by the application of the EDP rule remain adequate to achieve the principal goal of the EDP rule – improving the effectiveness of the Commission's attribution rules with respect to minority stockholder interests. In fact, the EDP rule expressly addresses the two most logical

and likely means by which a minority shareholder may exert meaningful influence over a licensee's core operational decisions, as a major program supplier or by holding an attributable interest in another media outlet in the same market.

In sum, there is no evidence that the Commission's rationale for adoption of the single majority shareholder exemption in 1983 was incorrect or that the exemption has or is undermining the Commission's broadcast attribution rules. To the contrary, as explained above, the exemption is consistent with the purpose of the attribution rules. There is, therefore, no basis for repeal of the exemption.

III. THE SPECIFIC QUESTIONS RAISED IN THE FNPRM DO NOT PROVIDE ANY NEW BASIS FOR THE REPEAL OF THE SINGLE MAJORITY SHAREHOLDER EXEMPTION.

In the FNPRM, the Commission asks for comments on whether a minority shareholder might be able to exert influence over a broadcast licensee's core operational functions by the following means: (i) as a result of the fiduciary duties owed to minority shareholders under general corporate law; (ii) by virtue of the minority shareholder's ability to withdraw a substantial capital investment in the corporation; (iii) through the minority shareholder's access to confidential corporate information; and (iv) as a consequence of management's responsibility to pay attention to the interests of significant, but not controlling, shareholders. *FNPRM* at ¶ 90. Set forth below is a discussion of corporate law, which demonstrates that none of these reasons supports attribution of minority stock interests in a corporation with a single majority voting shareholder.

A. The Fiduciary Duties Owed To Minority Shareholders Under General Principles Of Corporate Law Do Not Give Minority Shareholders The Ability To Affect Programming Decisions Or Other Core Operating Functions Of Broadcast Licensees.

The Commission first asks whether a minority shareholder might be able to exert influence over a broadcast licensee's core operational functions as a result of the fiduciary duties owed to minority shareholders under general corporate law. As a matter of corporate law, the day-to-day operations of a corporation are managed by its board of directors. Substantive decisions of a corporate broadcast licensee, including decisions relating to programming, personnel or finances, are firmly vested in the board of directors.

The law does impose certain fiduciary duties on the board of directors and a majority shareholder. But those duties cede no control or influence to minority shareholders. Indeed, neither the board nor a majority shareholder are obligated to take into account the views of minority shareholders, and their fiduciary responsibilities do not flow to the shareholders individually. The board or the majority shareholder would, in fact, breach their fiduciary duties if they were to take actions favoring a single shareholder. *See* Julian Javier Garza, *Rethinking Corporate Governance: The Role of Minority Shareholders – A Comparative Study*, 31 St. Mary's L. J. 613, 625-26 (1995) ("These duties impose an obligation upon majority shareholders and directors to act in good faith concerning corporate affairs of the company. This obligation extends to require the promotion of corporate and shareholder interests above personal individual interests."). *See also*, *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464, 471 (Cal. 1969) ("Majority shareholders may not use their power to control corporate activities in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business.").

As noted above, the board of directors is charged with the management of the day-to-day operations of a corporation. Under its fiduciary duties, a board owes a duty of care and a duty of loyalty to the corporation. These duties are satisfied if the board in good faith makes an informed business decision, which is not grossly negligent. *See Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985); *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). Under the business judgment rule, courts presume that a corporation makes business decisions on an informed basis, in good faith, and in the honest belief that the board's course of action is taken in the best interests of the corporation. *Clark* at §3.4.

A minority shareholder's rights are protective only:

The rights of minority shareholders relating to the management of the corporation are merely for protective purposes, by resort to the courts, to prevent, set aside or otherwise obtain relief against *ultra vires*, fraudulent or unfair acts of those in control of the corporation.

Fletcher Cyc. Corp. § 5813. When those extreme circumstances are not present, the general rule is that minority shareholders cannot obtain judicial relief with respect to acts of the majority that are within the powers of the corporation. *Id.*

As the foregoing demonstrates, the fiduciary duties owed by the board of directors and the majority shareholder of a corporation do not give minority shareholders the ability to exert any meaningful influence over the routine, day-to-day operational decisions and business affairs of a corporation. In fact, minority shareholders have the ability, by resort to the courts, to overturn or set aside the business decisions of the majority only in the extreme circumstance where those in control have acted in an *ultra vires*, fraudulent or unfair manner.

B. A Minority Shareholder Cannot Exert Meaningful Influence Over A Corporate Licensee's Core Operational Decisions By Virtue Of Its Ability To Divest Its Equity Interest In The Corporation.

The Commission also asks whether minority shareholders “that have contributed significant capital may have influence by virtue of their ability to withdraw that investment.” FNRPM at ¶ 90. This proposition is fundamentally flawed. “A share of stock is primarily a profit-sharing contract, a unit of interest in the corporation based on a contribution to the corporate capital.” James D. Cox, Thomas Lee Hazen & F. Hodge O’Neal, *Corporations* § 13.1 (Aspen Law & Business 1997). A minority shareholder’s status as an owner of corporate stock conveys certain rights, including the right to participate ratably in dividend distributions when ordered by management of the corporation. *Id.* However, the minority shareholder may not simply “withdraw” its investment. Unlike a loan, the value of a minority shareholder’s equity interest in a corporation is not guaranteed. Like other shareholders, the minority shareholder can only divest its interest by selling its shares in the corporation to a third party at the prevailing market rate. Because such a divestiture does not adversely affect the capital of the corporation, the ability of a minority shareholder to divest its shares in the corporation does not translate into meaningful influence over core operational business decisions of the corporation.

Moreover, in many corporations, particularly privately held corporations, shares are not freely transferable or are transferable only subject to a right of first refusal held by other shareholders. Thus, there may be little or no market for minority shares, and the market that exists routinely discounts the value of minority interests, in contrast to the “control premiums” that a majority shareholder may enjoy. “Control shares often carry a premium over fair market value, because (at the very least) a controlling shareholder can dictate changes in business policies within a broad legal range.” Richard A. Booth, *Minority Discounts and Control*

Premiums in Appraisal Proceedings, 57 Bus. Law. 127,129 (2001). The market thus recognizes the minority shareholder's lack of control or even influence over corporate decision-making by discounting the value of minority interests, while placing a premium on control interests.⁶

The same is true in the case of a publicly held corporation controlled by a single majority voting shareholder. But in the case of a publicly held corporation, the threat to sell will generally ring even more hollow. At best, the threat is – “I’ll hurt the value of your stock by selling at a low price.” But the threat, if implemented, would hurt the selling minority shareholder more than the majority shareholder, who would still enjoy a control premium should the majority shareholder ever decide to sell.

C. A Minority Shareholder Does Not Have An Automatic Right To Confidential Business Information And, If Such Information Is Obtained, Must Keep It In Confidence.

The Commission also asks whether a minority shareholder may have access to confidential information and therefore somehow be able to influence the corporation's business affairs. FNPRM at ¶ 90. The Commission does not explain how a minority shareholder's access to confidential information would give it influence over the corporation. Presumably, the Commission's supposition is that a minority shareholder with access to confidential information could attempt to blackmail the corporation by threatening to disclose confidential information unless the corporation acceded to the shareholder's demands.

The Commission's premise is faulty in several regards. First, no shareholder, minority or majority, has the automatic right to a corporation's confidential or sensitive information. Under corporate common law, shareholders have at most the right to inspect certain

⁶ The Commission has applied such control premiums in attribution proceedings. *See Roy M. Speer*, 11 FCC Rcd 18393, 18450 (1996) (“for purposes of a cross-interest analysis, we shall utilize the average control premium paid in public stock markets. Empirical studies indicate that the average is between 40 and 50 percent above the price of minority shares.”).

corporate books and records, *provided* that the shareholder proves a proper purpose for the inspection of such material. *Clark* at § 3.1.3. This right is codified in Section 220 of Delaware’s General Corporation Law, which requires a stockholder to submit such inspection requests to the corporation in writing and under oath, and to include a statement as to the proper purpose of the request. Del. Code Ann. tit. 8, § 220(a) (2000). A “proper purpose” is defined under the Delaware Code as “a purpose reasonably related to such person’s interest as a stockholder.” *Id.* The requirement to demonstrate a proper purpose to inspect the corporate books and records serves to prevent improper dissemination of confidential or sensitive corporate information, including trade secrets. *Clark* at § 3.1.3.

Second, in the case of publicly held corporations, the law limits the ability of a corporation to disclose confidential information to its shareholders. Under Rule 100 of the regulations of the Securities and Exchange Commission, also known as Regulation FD (Full Disclosure), if a corporation discloses, intentionally or unintentionally, material, non-public information to one of its shareholders under circumstances in which it is reasonably foreseeable that the shareholder will either purchase or sell the corporation’s shares on the basis of that information, the corporation must make a public disclosure of that information unless the shareholder expressly agrees to hold that information in confidence. 17 C.F.R. § 243.100. A corporation that discloses confidential information to its shareholders has a duty to require those shareholders to agree not to disclose the information. If the corporation does not require its shareholders to do so, it is obligated to disclose that confidential information to the public, at which time the information is no longer confidential. *Id.*

Accordingly, the Commission’s premise that a minority shareholder may have access to confidential information by virtue of its ownership interest is faulty. Minority shareholders do not have a right to confidential corporate information, and the law, specifically

Regulation FD, prohibits a publicly held corporation from disclosing confidential information on which a shareholder may trade unless the shareholder agrees to maintain that confidentiality.

If a minority shareholder nevertheless obtains access to confidential information, that access does not give the minority shareholder influence over the corporation, because a threat to trade stock on the basis of the information, if executed, (1) may be illegal and (2) as explained in the preceding Section III.B., may harm the minority shareholder more than the corporation.

D. The Influence of Minority Shareholders In A Corporation Controlled By A Single Majority Shareholder Is Substantially Less Than The Influence Exercised By Other Corporate Constituents.

The Commission asks whether corporate management, “although not legally obliged to do so, may feel a special responsibility to pay attention to the interests of significant, but not controlling, shareholders.” It is not clear why management would be more attentive to the interests of a minority shareholder in a corporation with a single majority voting shareholder than to the interests of other corporate constituents, and the Commission either does not attribute such other constituents for purposes of the broadcast multiple ownership rules, or attributes them only if the constituent’s relationship with the licensee triggers the EDP rule.

Although the principal goal of a corporation is the maximization of shareholder wealth, which is achieved through the efficient and profitable operation of corporate business affairs, corporate decisions also may be influenced by a variety of other external forces. More than one-half of the states have statutes that allow, or under certain limited circumstances require, corporations to consider the interests of other constituents or “stakeholders” – other than shareholders – in the corporation when making business decisions. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 Geo. Wash. L. Rev. 14, 16

(1992). Traditionally, these other constituents include suppliers, customers, creditors, employees and local communities. *Id.* The essential purpose of these constituency statutes is to “expand the permissible range of considerations for directors, and often officers as well, with respect to their fiduciary duty of care when making business decisions.” *Id.* at 29. The existence of such statutes illustrates the influential role that corporate constituents can have over corporate decision making.

These other constituents of a corporate broadcast licensee may have the ability to exercise meaningful influence over the licensee’s core operational decisions. For example, commercial advertisers may have the ability to influence a licensee’s programming decisions, because advertising revenues sustain the corporate licensee’s overall business operations. An advertiser may have the realistic ability to effect change in a corporate licensee’s overall programming and format decisions by refusing to purchase time on a particular program. But notwithstanding the potential ability of advertisers to exert meaningful influence over a broadcast licensee’s programming decisions, the Commission does not treat advertisers as attributable under the broadcast attribution rules.

Similarly, corporate broadcast licensees may not be able to ignore the demands of influential organized labor unions such as the American Federation of Television and Radio Artists (“AFTRA”) and the International Brotherhood of Electrical Workers (“IBEW”), which may represent the broadcast licensee’s employees at unionized stations. In many cases, organized labor unions may have the potential ability to exert meaningful influence over personnel and employment policy decisions of the licensee, including pay scale and other compensation issues, employee working conditions, and termination and grievance procedures. Notwithstanding the potential ability of labor unions to exert meaningful influence over a

licensee's core operational business decisions, the Commission does not treat labor unions at a unionized broadcast station as holding attributable interests in the broadcast licensee.

As the Commission also has recognized, institutional lenders or creditors may also exert meaningful influence over a broadcast licensee's core operational decisions. Substantial creditors, while not necessarily holding a direct voting interest in the corporation, "may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much, if not more, influence or control over some corporate decisions as voting equity holders whose interests are attributable." *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12582-83. The Commission also has found that program suppliers may exert significant influence over the licensee's programming decisions. *Id.* at 12585. Nevertheless, the Commission does not attribute the interests of creditors and programming suppliers unless the relationship otherwise triggers the Commission's EDP rule. *See* 47 C.F.R. § 73.3555 Notes 2(b) and 2(f).

Advertisers, labor unions, lenders and program suppliers all may have the potential ability to exert meaningful influence over the core operational decisions of a corporate broadcast licensee. Each of these entities may have the potential ability to exert far more influence over a broadcast licensee's core operational decisions than a minority shareholder in a corporation controlled by a single majority shareholder. Nevertheless, the Commission has never treated either advertisers or labor unions as having attributable interests in a broadcast licensee. And the Commission treats lenders and major program suppliers (defined as those that supply in excess of 15% of a station's weekly programming) as holding attributable interests only if their relationship with the broadcast licensee triggers the EDP rule. There is no reasonable rationale for treating minority shareholders in corporations controlled by single

majority shareholders more stringently than these other, potentially more influential corporate constituents.

IV. CONCLUSION

As explained above, a minority shareholder in a corporation controlled by a single majority shareholder is as a matter of law powerless to exert meaningful influence over the routine, day-to-day operational decisions and business affairs of a corporation. The day-to-day operations of a corporation are controlled by its board of directors. Shareholders have influence over day-to-day corporate affairs only to the extent that they can affect the composition of the board. In the case of a corporation with no controlling shareholder, a 5 percent shareholder has the potential ability, by joining in shareholder votes with other large shareholders, to affect the composition of the board. In contrast, in the case of a corporation with a single majority shareholder, minority shareholders have no ability to affect the composition of the board, because the majority shareholder has the power to elect the entire board. Therefore, only the single majority voting shareholder's ownership interest should be attributable.

The Commission has determined that the application of the EDP rule provides a sufficient safety valve to ensure the attribution of substantial creditors and major program suppliers that have the incentive and means to exert influence or control over licensee decisions regarding core licensee operations of broadcast stations. There is no rational basis for treating minority shareholders in single majority shareholder corporations more stringently than substantial creditors and major program suppliers, both of which have the potential to exert more influence over a broadcast licensee's core operational decisions than minority shareholders. Absent any evidence that abuse of the exemption is undermining the attribution rules, the

Commission should not undermine investment in the broadcast industry by eliminating the single majority shareholder exemption.

For the reasons set forth herein, Viacom respectfully requests that the Commission reinstate the single majority shareholder exemption to the broadcast attribution rules.

Respectfully submitted,

VIACOM INC.

Anne Lucey
Vice President, Regulatory Affairs
Viacom Inc.
1501 M Street, NW
Suite 1100
Washington, DC 20005

By: s/ Meredith S. Senter, Jr.
Steven A. Lerman
Meredith S. Senter, Jr.
John D. Poutasse

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, NW
Suite 600
Washington, DC 20006-1809

January 4, 2002

Its Attorneys